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80-872

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHNNY LEE SAVORY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE ILLINOIS APPELLATE COURT,
THIRD DISTRICT

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QUESTION PRESENTED FOR REVIEW

May the Illinois Appellate Court impose greater restrictions as a matter of federal constitutional law than has this Court on reinterrogation of a defendant who is in custody and has exercised his right to terminate questioning?

Parenthetically, need this Court's restrictions as set forth in *Michigan* v. *Mosley* be expanded?

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OPINION BELOW

The opinion of the Appellate Court of Illinois, Third Judicial District, is reported at 82 Ill. App. 3d 767, 403 N.E.2d 118 (3d Dist. 1980) (see Appendix A). The order of the Illinois Supreme Court denying leave to appeal is not reported, but is attached hereto (see Appendix B).

JURISDICTION

The opinion of the Illinois Appellate Court, Third Judicial District, was filed on April 4, 1980. A timely petition for leave to appeal was filed by the petitioner herein in the Illinois Supreme Court. The order of the Illinois Supreme Court denying the petition for leave to appeal was entered on September 29, 1980.

This Court's jurisdiction is invoked under 28 U.S.C. 1257(3). The instant petition for a writ of certiorari is filed within 60 days of the Illinois Supreme Court's order denying leave to appeal.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V

* * * nor shall any person * * * be compelled in any criminal case to be a witness against himself, * * *.

United States Constitution, Amendment XIV

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

The corpses of the victims of a double murder were discovered on January 18, 1977, in Peoria, Illinois, in the victims' home by their stepfather. Both had sustained multiple stab wounds. Many witnesses and suspects were interviewed and given lie detector tests in the course of the large-scale investigation that ensued.

Defendant herein, Johnny Lee Savory, was first questioned in the afternoon of January 25, 1977, at his high school by two officers. At this point the defendant was not a suspect, but was merely an investigatory lead, since he had apparently been the last person to see the victims alive.

The defendant gave an account of his activities on the evening before and the morning of the discovery of the murders to the officers who interviewed him at his school. These officers asked the defendant if he would voluntarily come to the police station so that other officers more familiar with the details of the crimes could question him on matters with which those first two officers may not have been familiar. After telling his story to the second two officers at the police station, several discrepancies were noticed between defendant's version and facts the officers had already developed from other sources in their investigation of the case. They asked the defendant about these discrepancies.

The officers also asked the defendant if he would submit voluntarily to a polygraph test, because they had no indication why the defendant would not have correctly stated the details as the officers knew them to be. The defendant did voluntarily agree to the polygraph test, which was administered that same evening, January 25, 1977.

As a result of his answers in the polygraph test, the defendant was placed under arrest. He was given the *Miranda* warnings immediately upon completion of the test and before leaving the office of the polygraph examiner. The defendant said he did not want to talk.

The defendant was not questioned any more that evening but was taken to the juvenile detention home. The next morning (26th of January, 1977), at approximately 10:30, in

the presence of the defendant's probation officer and his father, the defendant was again asked if he would like to talk in order to clear up some of the discrepancies in his story. At this time, before beginning questioning on the morning of the 26th, the defendant was again warned of his *Miranda* rights by one of the interrogating officers. In neither this morning session, nor the prior day's session, did defendant admit any complicity whatsoever in the murders. During the morning interrogation, the defendant was again confronted with several of the discrepancies between his story and the known facts, at which time the defendant changed his story.

The defendant was taken to lunch at noon and was brought back to the police station in the afternoon at 12:35. At that time the defendant stated explicitly that he would "tell everything," if his explanation could be made to Officer Marcella Brown, a juvenile officer. The defendant then gave another detailed statement of his activities, although none of his statement was incriminating. At 4:30 p.m. the questioning ceased and defendant had dinner. At 6 p.m. defendant arrived at the polygraph examiner's office and was given another polygraph examination. Immediately after this examination, at approximately 7:30, the defendant confessed the murders to Officer Marcella Brown.

The confession of the defendant was used as evidence at his trial for the dual murders, after his motion to suppress the confession had been denied by the trial judge. The defendant appealed his conviction, claiming that the reinterrogation following his first polygraph test and exercise of his right to silence violated his constitutional right to terminate questioning, since there was no showing that he knowingly and voluntarily waived that right during the reinterrogation before he confessed. Additionally, defendant claimed his confession was not voluntary considering the evidence as a whole, and that his sentences were excessive.

The Illinois Appellate Court, in a two-to-one decision, reversed the determination of the trial judge on the motion to suppress the confession, and remanded the cause for retrial in which the confession could not be used as evidence.

The crux of the appellate court's opinion was that the reinterrogation of the defendant on the morning after he exercised his right to terminate questioning was not preceded by a waiver and that reinterrogation was impermissible without the lapse of a significant amount of time, the giving of *Miranda* warnings, *together with the occurrence of some event communicated to the defendant which might indicate the reasonableness of the reconsideration of his previously exercised right to silence.*

The appellate court stated that it was the burden of the prosecution to show that something had occurred and had been communicated to the defendant upon which his change of position was predicated.

The appellate court held that the burden was not satisfied by the lapse of time and the giving of the *Miranda* warnings to the defendant in the morning after his first polygraph test, together with the waiver of those rights. The court held that the record must show at a minimum that before the reinterrogation was commenced, the defendant had changed his mind, *and that there was some reasons for his change of mind,* before the resumption of questioning could be deemed voluntary.

The appellate court also held that the confession was not voluntary under the totality of the circumstances, as well as that the defendant's statement that he would "tell everything" to Officer Marcella Brown was not a waiver of his previously exercised right to terminate questioning.

The petitioner herein, the State of Illinois, sought timely leave to appeal the decision of the Illinois Appellate Court in the Illinois Supreme Court, but leave was denied.

REASON WHY THE WRIT SHOULD BE GRANTED

THE ILLINOIS APPELLATE COURT SUBSTANTIALLY EXPANDED THIS COURT'S REQUIREMENTS FOR ADMISSIBILITY OF A CONFESSION GIVEN UPON REINTERROGATION OF A DEFENDANT WHO HAS PREVIOUSLY EXERCISED HIS RIGHT TO TERMINATE QUESTIONING. MOREOVER, THE ADDITIONAL FACTORS DEEMED CONSTITUTIONALLY NECESSARY BY THE ILLINOIS APPELLATE COURT ARE NOT NFEDED TO ADEQUATELY INSURE THAT THE CONFESSION WAS VOLUNTARY.

The defendant argued on appeal to the Illinois Appellate Court that the trial judge erred in denying his motion to suppress the confession he gave upon being reinterrogated after exercising his right to terminate questioning because the confession was not voluntary. To support his argument the defendant relied upon this Court's opinions in *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and *Michigan* v. *Mosley,* 423 U.S. 96, 96 S. Ct. 321, 46 L. Ed. 2d 313 (1975).

The petitioner herein maintained below that the prohibition against the questioning of the defendant which arose because of his request not to answer questions was sufficiently attenuated by the intervening time, circumstances at the time the confession was made, the intervening *Miranda* warnings given to him after his request to remain silent and before he confessed, and his express waiver of rights.

The Illinois Appellate Court decided that while *Michigan* v. *Mosley* is applicable in principle, and does not limit permissible reinterrogation to an offense other than the one

for which the defendant has been taken into custody,[1] there is a factor other than those set forth in *Mosley* which must be shown before the reinterrogation is permissible and the results admissible at a criminal trial of the defendant.

The petitioner maintains that the expansion of this Court's dictates in *Mosley* imposes greater federal constitutional restrictions on reinterrogation, and that this imposition of greater restrictions is impermissible. *Oregon* v. *Hass,* 420 U.S. 714, 719, 95 S. Ct. 1215, 1219, 43 L. Ed. 2d 570 (1975). "It follows that its judgment cannot stand, since a state court can neither add to nor subtract from the mandates of the United States Constitution." *North Carolina* v. *Butler,* 441 U.S. 369, 99 S. Ct. 1755, 1759, ____ L. Ed. 2d ____ (1979); *Oregon* v. *Hass, supra.*

Moreover, the petitioner maintains that the additional factor required by the Illinois Appellate Court is not necessary to insure the voluntariness of statements given during reinterrogation after a previous exercise of a right to terminate questioning by a defendant, but even if it were required, the requirement was fulfilled in the instant case.

That the holding of the Illinois Appellate Court expands upon the requirements of *Mosley* is unquestionable.

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[1] The People have no quarrel with the Illinois Appellate Court's holding that reinterrogation need not be about an offense other than the one for which the defendant was taken into custody, but may concern that same offense. While this Court has not spoken on this issue, several of the Circuit Courts of Appeal agree with the Illinois Appellate Court in this regard. *United States* v. *Finch,* 557 F.2d 1234 (8th Cir. 1977); *Lindsay* v. *United States,* 542 F.2d 755 (8th Cir. 1976); *United States* v. *Collins,* 462 F.2d 792 (2d Cir. 1972), *cert. denied,* 409 U.S. 988, 93 S. Ct. 343, 34 L. Ed. 2d 254; *Wilson* v. *Henderson,* 584 F.2d 1185 (2d Cir. 1978); *United States* v. *Boyce,* 594 F.2d 1246 (9th Cir. 1979); *United States* v. *Davis,* 527 F.2d 1110 (9th Cir. 1975); *Williams* v. *State of Ohio,* 547 F.2d 40 (6th Cir. 1976); *United States ex rel. Foye* v. *State of New Jersey,* 547 F.2d 217 (3d Cir. 1977); *United States* v. *Smith,* 609 F.2d 1011 (4th Cir. 1979).

This Court held that the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored. *Mosley,* at 423 U.S. 104. In *Mosley* all that was found to be required in determining that the right to cut off questioning was scrupulously honored was the immediate cessation of interrogation upon request, the resumption of questioning only after the passage of a significant period of time, and the provision of a fresh set of *Miranda* warnings. Such factors were deemed sufficient to warrant a conclusion that the subsequent reinterrogation and any statement made in response thereto was the product of a voluntary waiver of the previously expressed right to terminate questioning.

But the Illinois Appellate Court has required that in addition to the factors set forth in *Mosley,* there must be, at a minimum, a showing of record that before the reinterrogation was commenced, the defendant had changed his mind, and that there was something that had occurred and was communicated to defendant upon which his change of position was predicated.

The petitioner maintains that this additional factor is not required either by *Mosley* or under general constitutional guidelines. The exclusionary rule fashioned in *Miranda* looks to, and seeks to control, police conduct vis-a-vis the constitutional rights of the defendant. The focus is not on the motives of the person interrogated except insofar as it relates to his knowing and voluntary waiver of a constitutional right. This Court has deemed sufficient that there be a showing of a lapse of a significant period of time, together with the rewarning of the person interrogated regarding his *Miranda* rights, in order to show that the police did scrupulously honor the decision to cut off questioning, and did not refuse to discontinue the interrogation upon request or persist in repeated efforts to wear down the person's resistance to make him change his mind. *Mosley,* 423 U.S. at 106-107.

Nor do the facts of this case warrant a holding that any more is required to indicate a waiver of the previously exercised right to cut off questioning than was required in *Mosley*. The facts are plain that once the defendant exercised his right to remain silent after his first polygraph test on the night he was arrested, all questioning by the police ceased immediately. Moreover, the defendant was not reinterrogated until 10:30 the following morning, 12 hours after he had exercised his right to cut off questioning. This is in contrast to the *2-hour* period which was deemed sufficient in *Mosley*.

In addition, the reinterrogation the following morning was not in a pressurized atmosphere. The defendant was read his *Miranda* rights a second time, and was provided the guidance and counsel of both his probation officer and his father.

The defendant's right to remain silent was scrupulously honored in the instant case. This is not a case in which the Peoria police officers made a conscious attempt to wear down the defendant through repeated and continuous interrogations for the purpose of obtaining a confession. *See, e.g., United States ex rel. Doss* v. *Bensinger,* 463 F.2d 576 (7th Cir. 1972), *cert. denied,* 409 U.S. 932, 93 S. Ct. 239, 34 L. Ed. 2d 186; *United States* v. *Crisp,* 435 F.2d 354 (7th Cir. 1970).

The Peoria police recognized and respected the defendant's exercise of his right to cut off questioning as evidenced by the resumption of the interrogation only after a significant period of time had passed and a new set of warnings was given. The testimony at the hearing on the motion to suppress revealed that the defendant acquiesced after being fully informed of his rights without being subjected to compulsion or intimidation. The resumption of questioning was not violative of the principles of *Miranda* and *Mosley*.

But your petitioner maintains that even if this Court were to deem necessary the additional factor required by the Illinois Appellate Court, such factor was satisfied in the instant case. The record reveals adequate motivation for the defendant's decision to waive his previously asserted right to silence. The counsel of the defendant's father and his probation officer, who was his legal guardian, together with the facts confronting the defendant concerning the number of discrepancies that existed in the statements he had made to the police the previous day regarding his activities the day of the murders, leave little doubt that the defendant's conscious and voluntary decision to waive his right to silence and speak was motivated by his desire to explain the discrepancies and to remove from himself the onus of guilt of the murders which was fast descending upon him in the police investigation, albeit the task was impossible.

Nor can the fact that there was an express as well as voluntary waiver made by defendant be gainsaid.

The statement of the defendant in the afternoon interrogation session that he would "tell everything" to Officer Brown was an effective express waiver of his *Miranda* rights, including the previously asserted right to remain silent. It has been recognized that no specific form of an express waiver is necessary, and a colloquial statement of waiver is effective. *United States* v. *Boyce,* 594 F.2d 1246 (9th Cir. 1979).

In any event, this Court has indicated that an explicit statement of waiver is not invariably necessary to support a finding that the defendant has waived the rights guaranteed him by the *Miranda* case. *See North Carolina* v. *Butler,* 441 U.S. 369, 99 S. Ct. 1755, ____ L. Ed. 2d ____ (1979).

In this regard, the petitioner believes that the Illinois Appellate Court is in error in attaching significance to the fact that the statement expressing a waiver was not made immediately after the defendant was warned or that the

statement he did make immediately after the express waiver was not inculpatory, but that the statement made after the polygraph test some hours later was the incriminatory one. It must be pointed out that defendant had been repeatedly warned of his rights, and had already decided to make some statements. It has been held that no rewarning was necessary where there was an interval of 9 hours between the giving of the warnings and the incriminatory statement. *United States ex rel. Henne* v. *Fike,* 563 F.2d 809 (7th Cir. 1977).

For this reason the petitioner argues that it is not significant that a third set of *Miranda* warnings was not given to the defendant immediately before he gave the inculpatory oral statement on the evening after his second polygraph test. The defendant had not made any indication that he would refuse to answer the questions propounded to him, or otherwise exercise his right to remain silent, at any time on the day that he confessed.

Furthermore, even without the express waiver, the time interval between the first polygraph test and the exercise of the right to silence and the beginning of reinterrogation at 10:30 on the following morning can constitute a waiver of the previously exercised right. *White* v. *Finkbeiner,* 611 F.2d 186 (7th Cir. 1979).

Nor can it be said that the length of time over which these interrogations took place is coercive, so that the totality of the circumstances make the confession involuntary. Such a theory contradicts the rationale of *Mosley* that questioning can be resumed "only after the passage of a significant period of time." *Mosley,* at 423 U.S. 106.

In fact, *no delay* between the exercise of a right to terminate questioning and the attempted reinterrogation has been held to constitute a type of badgering which will make a statement obtained thereafter inadmissible. *United States* v. *Hernandez,* 574 F.2d 1362 (5th Cir. 1978); *United States* v. *Corral-Martinez,* 592 F.2d 263 (5th Cir. 1979).

In *White* v. *Finkbeiner,* 611 F.2d 186 (7th Cir. 1979), the time lapse between the request for counsel and the reconsideration of that decision was held to be the opposite of a coercive effect with regard to the subsequent waiver.

Indeed, in the instant case, until 11 o'clock on the night of the first day of his interrogation, the defendant was not even the focus of the investigation, but was merely an investigative lead. The defendant spoke freely to the officers at his school, and went freely to the station house to further answer questions. Defendant was provided with food and drink at his request (R. 59) and he was offered a polygraph test on a voluntary basis, which he voluntarily accepted (R. 68, 155). Furthermore, during this time the defendant was allowed to use the bathroom unaccompanied, although department policy is to accompany those under arrest or those who are suspects. (R. 71) The sum of these facts is indicative of the fact that the defendant is overstating his case of the "totality of the circumstances" test. Moreover, neither the first day of questioning nor the polygraph test had any bearing on this point since he was not under arrest until after the end of the first polygraph test. (R. 105-6) At that point the defendant was not questioned but was taken to the detention home. (R. 110)

The only time when the defendant was questioned as a suspect in the murders in which there was an attempt to obtain from him an incriminating statement was on the second day. It is to be noted that this interrogation began at 10:30 in the morning with the *Miranda* warnings, in an interview in which his probation officer and his father were present. (R. 137-141) The first interview on the 26th lasted a mere 1½ hours. At noon, the defendant was taken to lunch. It was after lunch that the defendant made the express waiver of his right to remain silent, saying that he would tell the whole story, but only to Officer Brown. (R.

144) This session of questioning was terminated at 5 p.m., at which time the defendant was taken to his evening meal. (R. 147) The polygraph test on the evening of the day on which the defendant confessed took place from approximately 7 to 8 p.m. (R. 147) It was after this test that the defendant made his inculpatory statements.

The People submit that under the circumstances as presented in the record of the hearing on the motion to suppress it cannot be said that under the "totality of the circumstances" test the defendant's confession was other than voluntary. The defendant was not browbeaten, did not offer evidence that he was harassed, threatened, or coerced, was given food and drink at every opportunity, and was not questioned for extended periods of time without a break. He never asked to leave before being arrested, never asked to make a phone call, never asked to have anyone, such as father or probation officer, present during questioning. (R. 112, 136) Additionally, during the first interview at which the defendant was interrogated as a suspect, after the investigation had focused upon him, he had the counsel and advice of both his probation officer and his father who were present during that interview. (R. 137)

In a similar situation, the confession made by a 16-year-old defendant of subnormal intelligence was ruled voluntary by the Eighth Circuit. The procedures used in questioning the minor were fair and humane, the periods of questioning were brief and during reasonable hours, the accused was allowed to eat regular meals, and other amenities were present which indicated the lack of coercion in spite of the duration of time between the initiation of interrogation and the eventual confession. *See Coney* v. *Wyrick,* 532 F.2d 94 (8th Cir. 1976).

Thus, insofar as the Illinois Appellate Court has extended, as a matter of federal constitutional law, the restrictions upon when a confession is admissible that has been obtained in a reinterrogation of a defendant after he has exercised his right to cut off questioning, that court has gone far beyond the reasons for this Court's holdings in *Miranda* and *Mosley*. Such an extension would cut this Court's holdings in *Miranda* and *Mosley* completely loose from their explicitly stated rationale, *Beckwith* v. *United States,* 425 U.S. 341, 345, 96 S. Ct. 1612, 1615, 48 L. Ed. 2d 1 (1976), and should be overruled. Moreover, the factor deemed necessary by the Illinois Appellate Court is not required, but will prove so detrimental to effective law enforcement, that it should not be allowed to stand. For such a trend in the law to be allowed to develop as a matter of federal constitutional doctrine will hamstring law enforcement officers in the use of effective and appropriate interrogational procedures long proved to be sufficient for protection of the rights of defendants who exercise the right to cut off questioning and later relinquish that right by knowing and voluntary waiver.

CONCLUSION

For the reasons and arguments stated herein, the petitioner respectfully requests that a writ of certiorari issue to the Appellate Court of Illinois, Third Judicial District, to review that court's decision which reversed the defendant's conviction herein, ordered his confession suppressed, and remanded the case for trial at which that confession could not be used in evidence against the defendant.

Respectfully submitted,

THE STATE OF ILLINOIS, *Petitioner*

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APPENDIX A

* * *

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v.
JOHNNY LEE SAVORY, Defendant-Appellant.
Third District No. 77-420
Reversed and remanded.
Opinion filed April 4, 1980.

1. CRIMINAL PROCEDURE (§ 331.10)—*State has burden of proving voluntary waiver of rights—murder.* It is burden of State to show that accused knowingly and voluntarily waived his rights of representation and to remain silent before accused's statement can be admitted into evidence.

2. CRIMINAL PROCEDURE (§ 331.10)—*valid relinquishment of rights will not be presumed from silence.*

3. CRIMINAL PROCEDURE (§ 331.35)—*no particular form is required for waiver of Miranda rights.* Although *Miranda* requires warnings and waiver of constitutional rights, no particular form of waiver is required, and waiver may be either express or implied, but waiver will not be implied either from silent record or from fact accused may have made statements.

4. CRIMINAL PROCEDURE (§331.35)—*defendant's statement that he would "tell everything" would not be considered waiver of Miranda rights.* Accused's statement that he would "tell everything", made at least three hours after warnings were given and questioning commenced, could not be considered knowing and voluntary waiver of accused's rights.

5. CRIMINAL PROCEDURE (§ 331.35)—*what necessary to establish waiver of rights after right to silence has been exercised.* Where person in custody was advised of his *Miranda* rights and exercised his right to remain silent, record should show at minimum that before reinterrogation was commenced such person had changed his mind, and that there was some reason for change of mind before resumption of questioning can be deemed voluntary.

6. CRIMINAL PROCEDURE (§ 331.15)—circumstances did not justify reinterrogation after defendant had exercised right to silence. Where lapse of time was principal circumstance relied upon to support reinterrogation of person in custody after such person had been advised of his *Miranda* rights and had exercised right to remain silent, and where prosecution conceded record failed to disclose waiver of constitutional rights at time they were readministered to such person, court failed to see how reinterrogation could be approved.

7. CRIMINAL PROCEDURE (§ 332)—*test of voluntariness of statement.* Test to be applied in determining voluntariness of statement is whether it has been made freely, voluntarily and without compulsion or inducement of any sort or whether defendant's will was overcome at time he confessed.

BARRY, J., dissenting.

APPEAL from the Circuit Court of Peoria County; the Hon. STEPHEN COVEY, Judge, presiding.

Robert Agostinelli and Theodore A. Gottfried, both of State Appellate Defender's Office, of Ottawa, and Michael Margolies, law student, for appellant.

Michael M. Mihm, State's Attorney, of Peoria (John X. Breslin, of State's Attorneys Appellate Service Commission, of counsel), for the People.

Mr. PRESIDING JUSTICE STOUDER delivered the opinion of the court:

After a jury trial in the circuit court of Peoria County, Johnny Lee Savory was found guilty of the murders of Connie Cooper and James Robinson, Jr. He was sentenced to concurrent terms of imprisonment of 50 to 100 years for each offense. On this appeal the defendant argues the court erred in denying his motion to suppress his confession because, first, there is no showing that he knowingly and voluntarily waived his constitutional rights; second, his right to refrain from responding to further questioning after he had indicated such an intention was not scrupulously observed; and third, his confession was not voluntary, considering the evidence as a whole. Defendant also contends the sentences imposed were excessive.

The defendant, Johnny Lee Savory, was 14 years old at the time these charges were brought. After a hearing it was decided the defendant should be prosecuted as an adult. The evidence at trial centered around the defendant's confession. The events and circumstances which preceded his oral confession and which were presented at the hearing on the defendant's motion to suppress his confession need to be summarized.

The bodies of the two victims were discovered on January 18, 1977, by the victims' stepfather, William Douglas, in the bedroom of their residence. Both had sustained multiple stab wounds. The police were notified, and this set into motion a large scale investigation. Many witnesses and suspects were interviewed and several were given lie detector tests.

Johnny Lee Savory, the 14-year-old defendant, was questioned by police officers beginning at 3:30 p.m. on January 25, 1977, in regard to the deaths of Connie Cooper and James Robinson. This interrogation began at the Late

Afternoon School where the defendant was a student. At the outset of the interrogation, the defendant stated he did not want to talk. However, the police convinced him to talk. The defendant was not given any *Miranda* warnings at that time. At that time, the defendant gave police an account of his activities of the day prior to the murders.

The defendant related that on the day prior to the murders, he met James Robinson, Jr., at the Late Afternoon School at approximately 3:30. The pair left together at 6:30 p.m. and arrived at the Robinson residence at 7. Savory stated that Robinson took the keys from the mailbox and opened the front door to the house where they prepared some food. Savory told the police that he had taken hot dogs out of the refrigerator and some corn and prepared it in a skillet. After finishing their meal, the pair placed the television on the floor and practiced Kung Fu. At approximately 8 p.m., the pair went to the residence of a Miss Jones, who lent defendant $4. Defendant gave half the money to Robinson and they went to a restaurant and ate. After chasing home a young man who had called them a dirty name, the two returned to the Robinson residence. The pair again practiced Kung Fu, and at 11 p.m., defendant walked home. Defendant further told the police that he called Robinson on the phone that night and spoke until about 1:30 or 2 in the morning. The defendant said that Robinson asked defendant to return at 8, although the defendant did not do so.

At about 4 p.m., the officers asked the defendant to return with them to the police station and defendant agreed to do so. On the way to the station, defendant suggested they stop at his father's house so he could show them a knife that was similar to one owned by the victim, James Robinson, and the officers did so. Defendant went into the house alone and returned without the knife saying that his father had the knife with him and was receiving medical attention at St. Mark's.

At 5 p.m., defendant was brought into an interrogation room at the police station and repeated his previous story before four officers. This session lasted about one-half hour. Later that evening, the defendant was again interrogated, this time with specific emphasis concerning certain factual discrepancies between some of the known facts and defendant's earlier statement. Specifically, defendant had stated that he was very close friends with Robinson and had in fact known both him and Cooper for many years. This, however, conflicted with other information known by the police. There also were discrepancies concerning who prepared the food that defendant and Robinson ate at the Robinson residence as well as the fact that the police had information defendant had not spoken to Robinson on the phone late in the evening prior to the murders. This session lasted one-half hour to 45 minutes.

Although he had made no incriminatory statements up to this point in time, defendant was taken to a polygraph examiner at 10 p.m. The defendant was accompanied by two police officers and his probation officer. The defendant was alone with the polygraph examiner for about an hour—until 11 p.m. At the end of the polygraph examination, the results of which were made known to Officer Cannon, the defendant was placed under arrest and read his *Miranda* rights. The defendant, in response, stated that he did not want to talk. At about 11 p.m., defendant was returned to the police station and later taken to the detention home for the night.

The following morning, January 26, 1977, defendant was reinterrogated. The reinterrogation began at approximately 10:30 a.m. at the police station with Percy Baker and Y. T. Savory, defendant's father, present. Officer Haynes, who did not testify at the suppression hearing, read defendant his *Miranda* rights. During the ensuing interrogation, defendant was confronted with several discrepancies at

which time defendant would change his story. However, defendant still denied committing the murders. This session ended around noon, whereupon defendant was fed.

At 12:30 p.m. defendant was again interrogated in a short session. At that time, defendant stated he would tell everything to Officer Brown. Officer Brown then began a session with the defendant that lasted until 5 p.m. Although defendant gave a detailed statement of his activities, he still made no incriminatory statements. At the close of this session, defendant was forced to change clothes.

At approximately 6 p.m. defendant again took a polygraph examination. This session, with just the defendant and the examiner present, lasted about an hour and a half. At the end of the examination, Officer Brown entered the examination room and the defendant then made incriminating statements. Defendant indicated to Officer Brown the location of some of the stab wounds. Defendant told Brown that he and Robinson were practicing Kung Fu and that Robinson wanted defendant to use the knife. Defendant stated that he accidentally stuck Robinson. Defendant said his mind went blank, and when Cooper came into the room, she came at him and he cut her.

Defendant then returned to the police station where he denied any involvement to Percy Baker, his probation officer. Officer Brown told the defendant that this was "backtracking" and began to question defendant for details of the murders.

Defendant filed a written motion to suppress the confession which was denied after a full hearing. The confession and earlier statements were heard as evidence at trial.

The rest of the State's evidence consisted primarily of a discussion of various pieces of physical evidence that was obtained at the Robinson-Cooper residence. The physical

evidence related to the nature of the victims' wounds, the physical setup of their home and did tend to show defendant had at some time been at the Robinson-Cooper residence. No eyewitnesses testified at trial.

In arguing the trial court erred in declining to suppress his confession the defendant urges the confession was not voluntary and refers to three areas which he contends support this conclusion. These areas include the failure of the defendant to waive his *Miranda* rights, his reinterrogation after he had declined to talk and finally, the length of the custodial interrogation. Although we will consider these areas separately, they are nevertheless interrelated and it is the combined effect of each which justifies our conclusion that defendant's confession should have been suppressed.

In arguing the court erred in refusing to suppress his confession the defendant first urges the evidence is insufficient to show his knowing and voluntary waiver of his *Miranda* rights.

• 1, 2 It is well settled since *Miranda* v. *Arizona* (1966), 384 U.S. 436, 16 L.Ed.2d 694, 86 S. Ct. 1602, that it is the burden of the State to show that a person knowingly and voluntarily waived his rights of representation and to remain silent before a defendant's statement can be admitted into evidence. It is also true that a valid relinquishment of one's rights will not be presumed from silence.

As shown by the testimony presented at the hearing on the defendant's motion to suppress his confession, following conversations with police officers in the late afternoon and evening of January 25 the defendant took a polygraph test at about 10 p.m. Because of discrepancies revealed by this test police officer Cannon testified that he placed the defendant under arrest and advised him of his *Miranda* rights. The defendant responded that he did not want to say anything more. Defendant was not questioned any further at this juncture and was thereafter lodged in the Peoria juvenile facility for the night. It is conceded by the parties that

defendant had not waived or relinquished his right to remain silent but on the contrary had affirmatively expressed his right to remain silent.

On the following morning, January 26, the defendant was taken from the juvenile facility to the police station at about 10'clock in the morning. The defendant was again admonished of his *Miranda* rights, this time by police officer Haynes. At the time of the suppression hearing Haynes was suffering the effects of a broken jaw, and he did not testify at that hearing nor at the trial. At the suppression hearing police officer Fires testified that he heard Haynes advise the defendant of his *Miranda* rights and heard the defendant respond that he understood his rights. Fires also testified that even after the defendant indicated his understanding of his rights Haynes continued to discuss some point about his rights with the defendant but Fires could not recall the subject of the further discussion. Then, according to Fires, Haynes commenced questioning the defendant, the interrogation continuing until noon. During this period the defendant's father and Percy Baker were present. Also, during this period the defendant made no inculpatory statements.

After being advised of his rights the defendant did not sign any written waiver, although it does not appear that he was requested to do so and refused. Nor does the record reveal an explicit oral waiver of his rights in the specific terms which are usually a part of a written waiver. The record indicates that he was merely advised of his rights and questioning commenced.

•3 Although *Miranda* requires warnings and waiver of constitutional rights no particular form of waiver is required. The waiver may be either express or implied. *United States* v. *Hayes* (4th Cir. 1967), 385 F.2d 375, and *Bond* v. *United States* (10th Cir. 1968), 397 F.2d 162. This rule was held to be an established application of the *Miranda* rule in the recent case of *North Carolina* v. *Butler* (1979), ____ U.S.

____, 60 L. Ed.2d 286, 99 S. Ct. ____ However, according to *Miranda,* waiver will not be implied either from a silent record or from the fact the defendant may have made statements. In *People* v. *Landgham* (1970), 122 Ill.App. 2d 9, 257 N.E.2d 484, where the facts were quite similar to those in the instant case, the record showed defendant was advised of his *Miranda* rights, but other than making an oral statement the record was silent concerning any evidence from which waiver could be inferred. In that case the court held the oral statements should have been suppressed.

• 4 In its brief the prosecution concedes that at the time defendant was advised of his *Miranda* rights at about 10:30 on the morning of January 26, there is no evidence in the record warranting any inference the defendant waived his rights. So far as the record is concerned no questions were asked of the witness, as was the case in *Landgham,* about anything the defendant did or said indicating his waiver of his rights. The only evidence called to our attention by the prosecution is the defendant's statement made at about 1:30 in the afternoon that he would "tell everything." We are unable to see how this phrase made at least three hours after warnings were given and questioning commenced can be considered a knowing and voluntary waiver of the defendant's rights. In this connection no cases have been called to our attention by the prosecution supporting the conclusion urged by the prosecution.

• 5 Next the defendant contends the reinterrogation which commenced on the morning of July 26, after he had expressed his desire the previous night of not wanting to talk about the homicides, also violated the dictates of *Miranda.* Both parties have relied on *Michigan* v. *Mosley* (1975), 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321, in opposition and in support of the principle of custodial reinterrogation. The prosecution argues that under *Mosley* custodial reinterrogation is permissible and not *per se* foreclosed by *Miranda.* The prosecution also contends that custodial reinterrogation

is not limited to questioning concerning other crimes by other police officers as was the factual setting in *Mosley*. We are inclined to agree with the prosecution that the principle of *Mosley* is not limited to its facts, but does suggest that the right of a defendant to remain silent may be scrupulously observed as required by *Miranda* and still permit reinterrogation where the compulsion and coercion of custody have been dissipated or attenuated by subsequent circumstances. This would of course include initiation of the questioning by the defendant (*People* v. *Morgan* (1977), 67 Ill. 2d 1, 364 N.E.2d 56) and reinitiation of questioning about other offenses by the same police officers after a substantial lapse of time as in *People* v. *White* (1975), 61 Ill. 2d 288, 335 N.E.2d 457, *cert. denied* (1976), 424 U.S. 970, 47 L. Ed. 2d 738, 96 S. Ct. 1469, decided prior to *Michigan* v. *Mosley* (1975), 423 U.S. 96, 46 L. Ed. 2d 313, 96 S. Ct. 321.

Circumstances which might dissipate or attenuate the inherent compulsion of a custodial setting would include at least the lapse of a significant amount of time together with the occurrence of some event communicated to the defendant which might indicate the reasonableness of the reconsideration of his position. If facts justifying reconsideration are relied upon it should be the burden of the prosecution to show that something had occurred and was communicated to the defendant upon which his change of position was predicated. This burden is not satisfied merely by the lapse of time and giving *Miranda* warnings again together with the defendant's waiver thereof. Where the defendant, as in the instant case, has exercised his right to remain silent, the record should show at the minimum that before reinterrogation was commenced, the defendant had changed his mind, and that there was some reason for his change of mind before the resumption of questioning could be deemed voluntary.

• 6 In the instant case at the initiation of the police officers the defendant was taken from the detention facilities to the

interrogation rooms at the police station and reinterrogation was commenced with the giving of *Miranda* warnings by an officer who was aware of the defendant's exercise of his right to remain silent the night before, but without any reference of defendant's prior exercise of his right. Although defendant's father was present on the morning of January 26, there is no indication in the record that the father's presence was the reason for reinitiating the interrogation by the police officers either before the defendant was brought to the interrogation room or afterward. It should also be noted that when custodial reinterrogation was commenced in the morning the defendant had been questioned more or less continuously from about 3 o'clock of the afternoon of the previous day until about 11 o'clock at night when he was arrested and then detained. It should also be recognized that the defendant was only 14 years old and already on probation. Where, as in this case, the principal circumstance relied upon to support reinterrogation is the lapse of time and where the prosecution concedes the record fails to disclose a waiver of constitutional rights at the time they were readministered to the defendant, we fail to see how reinterrogation can be approved. Indeed where the lapse of time relates to the incarceration of a 14-year-old boy in a detention facility, it is difficult to avoid the conclusion that such consideration was affecting the defendant's conduct.

• 7 Finally, when the previously described circumstances are combined with the length of time defendant was questioned, additional support is afforded for the general conclusion the defendant's statements were not proved to be voluntary. The test to be applied in determining the voluntariness of a statement is whether it has been made freely, voluntarily and without compulsion or inducement of any sort or whether the defendant's will was overcome at the time he confessed. (*People* v. *Prim* (1972), 53 Ill. 2d 62, 289 N.E.2d 601, *cert. denied* (1973), 412 U.S. 918, 37 L. Ed. 2d 144, 93 S. Ct. 2731.) *See Haley* v. *Ohio* (1948), 332 U.S. 596,

92 L. Ed. 224, 68 S. Ct. 302, and *People* v. *Simmons* (1975), 60 Ill. 2d 173, 326 N.E.2d 383, where the courts indicated special care should be given in scrutinizing the record to determine voluntariness where the defendant was a juvenile. At the hearing on the suppr sion motion the trial court was specially concerned with t eriod of from 3 o'clock in the afternoon until 11 that ght and in particular whether defendant was under arrest during this period and whether the questioning should have been considered custodial interrogation. As a result of the hearing the trial court was satisfied defendant was not in custody prior to his arrest at 11 p.m. because, according to the testimony of the police officers, the defendant was not a suspect during this period of time and in fact other persons had been given polygraph tests without being arrested or charged. Nevertheless, we do have a period of approximately eight hours, interrupted by a meal, of questioning on January 25 and then an additional period of questioning, interrupted by meals, commencing at about 10:30 in the morning of January 26 and continuing until about 8 p.m. when the inculpatory statements were made. We also observe that thereafter the defendant did not reaffirm his inculpatory statements but in fact recanted them shortly after they were made. Without deciding that the length of questioning would of itself justify suppression of the statements as not voluntary, we do believe the cumulative effect of all of the circumstances does compel the conclusion the prosecution did not sustain its burden of establishing the voluntariness of the statements. We believe the error in admitting the statements requires a new trial because we can not say beyond a reasonable doubt that it did not contribute to the verdict of the jury under the authority of *Chapman* v. *California* (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.

For the foregoing reasons the judgment of the Circuit Court of Peoria County is reversed and this cause is remanded for a new trial consistent with the views expressed herein.

Reversed and remanded.

SCOTT, J., concurs.

Mr. JUSTICE BARRY, dissenting:

I must dissent from the opinion of the majority because, for the reasons I am about to state, I firmly believe that the defendant's motion to suppress his confession was properly denied.

The majority's opinion hinges upon the finding that the defendant's right to remain silent, exercised after his arrest the evening of January 25, was violated by the subsequent interrogation by the Peoria police the next morning. In *Michigan* v. *Mosley* (1975), 423 U.S. 98, 46 L. Ed. 2d 313, 96 S. Ct. 321, the United States Supreme Court concluded that "the admissibility of statements obtained after the person in custody had decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.' " (423 U.S. 96, 104, 46 L. Ed. 2d 313, 321, 96 S. Ct. 321, 326.) The Supreme Court found that the defendant's right to remain silent was scrupulously honored under circumstances where there was a significant lapse of time between the defendant's assertion of his right not to talk and the reinterrogation (2 hours), the defendant was read his *Miranda* rights prior to the reinterrogation, and the reinterrogation concerned an offense different from the one for which the defendant was taken into custody. Although in the instant case the reinterrogation of defendant Savory the morning after he asserted his right to remain silent involved the same offense for which he was arrested, this fact alone does not necessitate a finding that the defendant's right to remain silent was not scrupulously honored. As the majority admits, the principle of *Mosley* is not limited to its facts. Indeed, this court has recently stated that the fact the second interrogation involved a completely different subject matter is only an "additional circumstance" which tends to demonstrate that the defendant's right to

remain silent scrupulously honored (*People* v. *Faison* (1979), 78 Ill. App. 3d 911, 397 N.E.2d 1233). However, it is essential that the record reflect, at the very least, a complete cessation of questioning for a significant period of time after the defendant indicates he wishes to remain silent coupled with the giving of a complete set of *Miranda* warnings prior to the initiation of reinterrogation. *Faison.*

In the case at bar, once the defendant exercised his right to remain silent, all questioning by the police ceased. The defendant was not reinterrogated until 10:30 the next morning (with his father and legal guardian present) and after he was read his *Miranda* rights a second time. Under a similar factual situation, the Second District, in *People* v. *Eason* (1976), 44 Ill. App. 3d 308, 357 N.E.2d 1191, held that the defendant's right to remain silent was scrupulously honored, and a statement made as a result of the reinterrogation admissible. In *Eason,* the defendant was arrested for armed robbery and taken to the police station. After receiving his *Miranda* rights, signing a waiver form, and participating in a lineup, he refused to answer any more questions. Accordingly, the interrogation ceased and he was placed in his cell. The next morning, after being read his *Miranda* rights a second time, he refused to offer any information about the robbery. In response, one of the officers stated, "Well, you probably wouldn't say anything if you could walk out of here scot-free." The defendant then said "that would be a different story," and when asked what he meant by that statement, made the statements which were the subject of his later motion to suppress. The defendant contended that this second interrogation was violative of *Miranda* and *Mosley.* The Second District, however, disagreed:

> "In the instant case the police discontinued their initial interrogation when the defendant refused to answer questions. A significant period of time passed before the detectives again advised him of his rights and, although they were still investigating the same crime, the defendant voluntarily agreed to talk with them.

> We hold that the statements in the instant case were not obtained in violation of *Miranda* and that the defendant voluntarily made those statements after being afforded the protection outlined in *Michigan* v. *Mosley*." (44 Ill. App. 3d 308, 314, 357 N.E.2d 1191, 1195.)

Just as the defendant's right to remain silent was scrupulously honored in *Eason,* defendant Savory's right to remain silent was scrupulously honored in the instant case. This is not a case in which the Peoria police officers, by questioning the defendant with regard to the discrepancies in the stories he had told the previous day, after a complete cessation of questioning for almost 12 hours and the giving of a fresh set of *Miranda* warnings, made a conscious attempt to wear down the defendant through repeated and continuous interrogations for the purpose of obtaining a confession. (See *e.g., United States ex rel. Doss* v. *Bensinger* (7th Cir. 1972), 463 F.2d 576, *cert. denied* (1972), ____ U.S. ____, ____ L.Ed. 2d ____, 93 S. Ct. 239; *United States* v. *Crisp* (7th Cir. 1970), 435 F.2d 354; *People* v. *Gibson* (1977), 55 Ill. App. 3d 929, 371 N.E.2d 341.) The Peoria police recognized and respected the defendant's exercise of his right to remain silent as evidenced by the resumption of interrogation only after a significant period of time had passed and new warnings were given. The testimony at the hearing on the motion to suppress reveals that the defendant "acquiesced without being subjected to compulsion or intimidation after being fully informed of his rights." (*People* v. *Pittman* (1973), 55 Ill. 2d 39, 56, 302 N.E.2d 7, 15-16.) The resumption of questioning was not violative of the principles of *Miranda* and *Mosley.*

The majority takes the position that even though a reinterrogation following a defendant's exercise of his right to remain silent may be preceded by a significant time interval and a second set of *Miranda* warnings, a statement

subsequently made by the defendant is automatically rendered inadmissible unless the State proves in addition that some event was communicated to the defendant which would "indicate the reasonableness of the reconsideration of his position." The placing of this added burden upon the State is not mandated by *Miranda, Mosley,* or the constitution, nor in my view is it required. The right of a criminal defendant to remain silent is amply protected by examination of police conduct in light of *Mosley.* If the record reflects a failure on the part of law enforcement authorities to appreciate and honor a defendant's desire to terminate questioning through the exercise of his constitutional rights, the exclusionary rule operates to prevent any statements obtained as a result of the resumption of interrogation from being admitted into evidence regardless of the defendant's motivation for speaking. Likewise, if the dictates of *Mosley* are followed, and the defendant's right to remain silent is scrupulously honored, the reason why the defendant speaks pursuant to a subsequent interrogation is, for *Mosley* purposes, irrelevant. What is under scrutiny in both *Mosley* and *Miranda* is police conduct and procedure, not the reasoning behind the defendant's decision to speak. The majority's decision to impose upon the State the added burden of showing the defendant's motivation to make a statement does not aid in the elimination of overt attempts by law enforcement authorities to elicit confessions from suspects through ceaseless interrogation once the police are informed that questioning is to be terminated, which is the aim of *Mosley* and *Miranda.*

Assuming arguendo that the State has the added burden of showing that there was communicated to the defendant some event "which might indicate the reasonableness of the reconsideration of his position," I believe this burden has been met in the instant case. The record reveals adequate motivation for the defendant's decision to waive his pre-

viously asserted right to silence. Present with the defendant when the reinterrogation commenced on the morning of January 26 were his father and Percy Baker, his legal guardian. At the outset, the defendant was confronted with a number of discrepancies that existed in the statements he had made to the police the previous day regarding his activities the day of the murders. There can be little doubt that defendant Savory's conscious and voluntary decision to waive his right to silence and speak was motivated at least in part by a desire to explain away the discrepancies in the presence of his father and guardian. (*Cf. People* v. *Perez* (1979), 72 Ill. App. 3d 790, 391 N.E.2d 456 (defendant decides to speak after being confronted with victim's ring).) In light of the circumstances, the defendant's decision to speak was reasonable, and I believe satisfies the requirement of the majority, if it be necessary, regarding the burden placed upon the State beyond that imposed by *Mosley.*

Even if the defendant's right to remain silent was violated by the resumption of questioning the morning following his arrest, I believe that the defendant's confession, given much later in the day, was nevertheless admissible. The failure of the police to honor a defendant's right to remain silent constitutes a violation of the procedural safeguards mandated by *Miranda.* (See *People* v. *Gibson* (1977), 55 Ill. App. 3d 929, 371 N.E.2d 341.) However, the Illinois Supreme Court has held that the effect of such procedural *Miranda* violation may be neutralized by subsequent events so as to make a confession obtained after the violation admissible. (*People* v. *White* (1975), 61 Ill. 2d 288, 335 N.E.2d 457.) In *White,* the supreme court was faced with a procedural *Miranda* violation in the form of a failure to furnish the defendant with counsel after representation was requested. The court found that "the effect of the procedural violation of the *Miranda* standards was sufficiently dissipated by lapse of time, repeated admonitions and

other intervening events so that the defendant's confession was voluntary and was therefore properly received in evidence." (61 Ill. 2d 288, 297, 335 N.E.2d 457.) Applying the factors found to be important in *White* to the case at bar, it appears that the effect of the *Miranda* violation (if there was one at all) was sufficiently attenuated, and the confession therefore properly obtained. The alleged *Miranda* violation occurred at approximately 10:30 a.m. on January 26 when reinterrogation commenced. No confession, however, was obtained until 7:30 that evening. During the time between the resumption of interrogation and the eventual confession, the defendant ate two meals, was allowed to speak at length with Officer Marcella Brown after requesting an opportunity to speak with her privately (and after stating that he "would tell everything"), changed his clothes and voluntarily took a second polygraph examination. It is true that repeated *Miranda* admonitions were not given during the day, but "it is not necessary to repeat the warnings at the beginning of each successive interview to avoid a *Miranda* violation." (*People* v. *Bundy* (1979), 79 Ill. App. 3d 127, 133, 398 N.E.2d 345, 349.) The lapse of time from the commencement of reinterrogation to the subsequent confession, coupled with the circumstances and the events during the day, attenuated any deleterious effect of the initial *Miranda* violation. For this alternative reason the confession was properly received into evidence.

The majority concludes by stating that all of the facts in this case support the "general conclusion" that the defendant's statement was involuntary. In *People* v. *Ybarra* (1977), 46 Ill. App. 3d 1049, 1050, 361 N.E.2d 678, 679, the court stated:

> "Whether a statement is voluntarily given depends upon the totality of the circumstances. The test is whether it has been made freely, voluntarily and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he

> confessed. In making its decision, the trial court need not be convinced beyond a reasonable doubt, and the trial court's finding that the statement was voluntary will not be disturbed unless it is contrary to the manifest weight of the evidence. (*People* v. *Prim* (1972), 53 Ill. 2d 62, 289 N.E.2d 601 *cert. denied,* 412 U.S. 918.)"

(Accord, *People* v. *Pittman* (1973), 55 Ill. 2d 39, 302 N.E.2d 7; *People* v. *Boerckel* (1979), 68 Ill. App. 3d 103, 385 N.E.2d 815.) It cannot be denied that in this case the defendant was in custody for over 24 hours before he confessed to the murders of James Robinson and Connie Cooper (although until approximately 11 p.m. on the 25th he was not a suspect, and there is no evidence that he would have been restrained had he attempted to leave the police station prior to that time), and there is no doubt that courts are to be particularly mindful of interrogations involving juveniles. (*Haley* v. *Ohio* (1948), 332 U.S. 596, 92 L. Ed. 224, 68 S. Ct. 302; *People* v. *Simmons* (1978), 60 Ill. 2d 173, 326 N.E.2d 383; *People* v. *Stone* (1978), 61 Ill. App. 3d 654, 378 N.E.2d 263.) However, the circumstances surrounding this confession compel a finding of voluntariness. When the questioning of the defendant resumed on the morning of January 26 after a complete cessation for almost 12 hours, the defendant was not told by the police to confess to the murders. He was, rather, merely confronted with the discrepancies in his previous statements, and asked to explain them. Shortly before noon, the defendant's father, who had been present, told the defendant to tell the truth. At noon, the defendant ate lunch by himself, and approximately 35 minutes later told two police officers and his guardian Baker that he would "tell everything" but only to Officer Marcella Brown. At this time Officer Brown and the defendant met privately in the office of the juvenile bureau lieutenant, and, according to Officer Brown, the first thing the defendant told her was "to get a piece of paper and a pencil and write down everything he told me having to do with this incident." The defendant

then described, in narrative form, his activities on the day of the murders, insisting that Officer Brown write down everything. When the defendant was finished, Officer Brown asked the defendant's legal guardian, Baker, to come into the office. It was readily apparent that the statements the defendant had previously given to Baker were inconsistent with the statement he had just given to Brown and consequently both Brown and Baker asked the defendant to explain the discrepancies. About 45 minutes later they were joined by Officer Fires. At 4:30, the questioning ceased, and the defendant had dinner. After dinner, the defendant changed his clothes and at approximately 6 arrived at the office of the polygraph examiner with Officers Brown and Fires and Mr. Baker. No police officers were present when the defendant took the examination. At approximately 7:30 the polygraph examination ended and, Officer Brown testified, the following occurred:

"A. I entered the polygraph room where Johnny Savory was seated in a chair and had a conversation with him.

Q. Did he indicate a willingness to talk with you at that time?

A. Yes, he did. I asked him what he wanted to talk to me about and he had requested to talk to me and he then gave me a narrative of his involvement in the murders in this case and admitted that he had killed Connie Cooper and James Robinson.

Q. Who was present at that time?

A. Just myself and Johnny Savory."

At no time prior to his confession was the defendant told to confess to the murders of James Robinson and Connie Cooper. The police officers instead focused their questioning of the defendant on the discrepancies in his story. The defendant never told the police to cease the questioning. In addition, he agreed to take the polygraph examination on the evening of the 26th, and when he eventually did confess, did so voluntarily and to the police officer whom he apparently trusted the most and with whom he felt the most comfortable. This is not a case where police compulsion caused a defendant's will to be overcome. The defendant here, who was street-wise and not naive with regard to the procedures of the police department, simply realized that he had been caught in a web of his own making and had no recourse but to admit the killings. I believe the confession was voluntary, and would affirm the defendant's convictions.

APPENDIX B

ILLINOIS SUPREME COURT
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September 29, 1980

State's Attorneys Appellate
Service Commission
Third Judicial District
P. O. Box 654
Ottawa, Illinois 61350

No. 53459 —People State of Illinois, petitioner, vs. Johnny Lee Savory, respondent. Leave to appeal, Appellate Court, Third District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

Clerk of the Supreme Court

Cir

all

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SUPREME COURT, U.S.

NO. 80-872

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHNNY LEE SAVORY,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, Johnny Lee Savory, by his attorneys, Robert Agostinelli and Theodore A. Gottfried, Office of the State Appellate Defender, move this Court for leave to proceed in forma pauperis pursuant to United States Supreme Court Rule 53.

In support of this motion, an affidavit is attached.

Respectfully submitted,

Theodore A Gottfried

ROBERT AGOSTINELLI
THEODORE A. GOTTFRIED
Office of the State Appellate Defender
300 East Monroe, Suite 100
Springfield, Il. 62701
217/782-7203

COUNSEL FOR RESPONDENT

ID/

NO. 80-872

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE STATE OF ILLINOIS,

Petitioner,

vs.

JOHNNY LEE SAVORY,

Respondent.

AFFIDAVIT

I, JOHNNY LEE SAVORY, being first sworn according to law, depose and say:

1. I am the Respondent in the above entitled cause;
2. My poverty renders me unable to pay the costs to proceed in this Court;
3. I am unable to give security for the same.
4. I have proceeded as an indigent person in all proceedings below.

X Johnny Lee Savory

Johnny Lee Savory
Respondent

Subscribed and sworn to before me this 4th day of December, 1980.

Notary Public

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SUPREME COURT, U.S.

NO. 80-872

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE STATE OF ILLINOIS,

Petitioner,

-vs-

JOHNNY LEE SAVORY,

Respondent.

NOTICE

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PLEASE TAKE NOTICE that on December 9th, 1980, I have mailed to the Clerk of the Supreme Court of the United States a copy of the attached Response in Opposition to Petition for Writ of Certiorari, and I am serving each of you with a copy by mail in envelopes with sufficient prepaid postage in the mail in Springfield, Illinois and addressed as indicated above on the 9th day of December, 1980.

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NO. 80-872

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE STATE OF ILLINOIS,

Petitioner,

-vs-

JOHNNY LEE SAVORY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Illinois Appellate Court which is based on three separate grounds is consistent with the decisions of this Court.

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TABLE OF AUTHORITIES

Tague v. Louisiana, ____ U.S. ____, 62 L.Ed. 2d 622, 100 S.Ct. 652 (1980);

North Carolina v. Butler (1979) 441 U.S. 360, 60 L.Ed. 2d 286, 99 S.Ct. 1755;

Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L. Ed. 2d 313 (1975);

Haley v. Ohio (1948) 32 U.S. 596, 92 L.Ed. 244, 68 S.Ct. 301;

Bond v. United States (10th Cir. 1968) 397 F.2d 162;

United States v. Hayes (4th Cir. 1967) 387 F.2d 162.

NO. 80 - 872

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE STATE OF ILLINOIS,

Petitioner,

-vs-

JOHNNY LEE SAVORY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
APPELLATE COURT OF ILLINOIS, THIRD DISTRICT.

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the Appellate Court, Third District of Illinois is reported as People v. Savory, 82 Ill. App. 3d 767 (Ill. 1980) and is reprinted in Appendix A (pp. 1a-21a) to the Petition for Certiorari.

JURISDICTION

The opinion of the Illinois Appellate Court, Third Judicial District was filed on April 4, 1980. The order of the Illinois Supreme Court denying the petition for leave to appeal was entered on September 29, 1980.

CONSTITUTIONAL PROVISIONS INVOLVED

The Respondent agrees with the denotation of constitutional provisions appearing in the Petition for Certiorari (the Fifth and Fourteenth Amendments to the Constitution of the United States).

STATEMENT OF FACTS

The bodies of the two victims were discovered on January 18, 1977 by the victims' stepfather, William Douglas, in the bedroom of their residence. (R.392) Both had sustained multiple stab wounds. The police were notified and this set into motion a large scale investigation. Many witnesses and suspects were interviewed and several were even given lie detector tests. (R.176, 177)

Johnny Lee Savory, the fourteen-year old defendant, was questioned by police officers beginning at 3:30 P.M. on January 25, 1977 in regard to the deaths of Connie Cooper and James Robinson. This interrogation began at the Late Afternoon School where the defendant was a student. (R.44) At the outset of the interrogation, the defendant stated he did not want to talk. (R.45) However, the police convinced him to talk. The defendant was not given any Miranda warnings at that time. (R.78) At that time, the defendant gave police an account of his activities of the day prior to the murder. (R.45-50)

At 5:00 P.M., defendant was brought into an interrogation room at the police station and repeated his previous story before four officers. (R.58) This session lasted about one-half hour. (R.60) Later that evening, the defendant was again interrogated,

this time with specific emphasis concerning certain factual discrepancies between some of the known facts and defendant's earlier statement. (R.64) This session lasted one-half hour to forty-five minutes. (R.64)

Although he made no incriminatory statements up to this point in time, defendant was taken to a polygraph examiner at 10:00 P.M. (R.101) The defendant was accompanied by two police officers and his probation officer. (R.102) The defendant was alone with the polygraph examiner for about an hour--until 11:00 P.M. (R.104) At the end of the polygraph examination, the results of which were made known to Officer Cannon, the defendant was placed under arrest and read his Miranda rights. (R.106-107) The defendant, in response, stated that he did not want to talk. (R.121) At about 11:00 P.M., defendant was returned to the police station and later taken to the detention home for the night. (R.109, 110)

The following morning, January 26, 1978, the defendant was not taken to juvenile court but was returned to the police station for further interrogation. The re-interrogation began at approximately 10:30 A.M. at the police station with Percy Baker and Y.T. Savory, defendant's father, present. (R.138) Officer Hines, who did not testify at the suppression hearing, read defendant his Miranda rights. (R.138) During the ensuing interrogation, defendant was confronted with several discrepancies at which time defendant would change his story. (R.141) However, defendant still denied committing the murder. (R.141) This session ended around Noon whereupon defendant was fed.

At 12:30 P.M., defendant was again interrogated in a short session. At that time, defendant stated he would tell everything to Officer Brown. (R.144) Officer Brown then began a session with

the defendant that lasted until 5:00 P.M. (R.147) Although defendant gave a detailed statement of his activities, he still made no incriminatory statements. (R.146) At the close of this session, defendant was forced to change clothes. (R.147)

At approximately 6:00 P.M., defendant again took a polygraph examination. (R.181) This session, with just the defendant and the examiner present, lasted about an hour and a half. (R.188) At the end of the examination, Officer Brown entered the examination room and the defendant then made incriminating statements. (R.188) Defendant indicated to Officer Brown the location of some of the stab wounds. (R.183) Defendant told Brown that he and Robinson were practicing Kung Fu and that Robinson wanted defendant to use the knife. (R.820) Defendant stated that he accidentally stuck Robinson. (R.820) Defendant said his mind went blank and when Cooper came into the room, she came at him and he cut her. (R.818)

Defendant then returned to the police station where he denied any involvement to Percy Baker, his probation officer. (R.204) Officer Brown told the defendant that this was "backtracking" and began to question defendant for details of the murder. (R.204) In answer to questions from Officer Brown, defendant said that Robinson had been wearing dark trousers. (R.191) He also told Officer Brown that he had left a bottle of fingernail polish at the Robinson residence. (R.191) Finally, he stated that he had used the knife that the police had in their possession. (R.192) Defendant's confession was in error, however, as to the room in which victim James Robinson was stabbed and as to the color of the victim Cooper's nightgown. (R.206, 207)

Defendant filed a written motion to suppress the confession (C.112) which was denied after a full hearing. (C.409) The confession and earlier statements were heard as evidence at trial.

The rest of the State's evidence consisted primarily of a discussion of various pieces of physical evidence that was obtained at the Robinson-Cooper residence. The physical evidence related the nature of the victim's wounds, the physical setup of their home and did tend to show defendant had at some time been at the Cooper-Robinson residence. No eye-witnesses testified at trial.

On appeal, the defendant argued 1) there was no oral or written waiver of Miranda rights; 2) The statement was not voluntary; and 3) The defendant's right to cut off questioning was not scrupulously honored.

The Appellate Court agreed with all three of the defendant's claims and reversed and remanded the case for a new trial. The Illinois Supreme Court then denied the state's petition for leave to appeal.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

The Respondent argues the following reason why the writ of certiorari should not be granted:

> The decision of the Illinois Appellate Court is based on three separate grounds which are consistent with the decisions of this Court.

Because the defendant in this case was a 14-year old boy, the Appellate Court used special care in scrutinizing the record to determine the voluntariness of the statement. Citing this Court's opinion in Haley v. Ohio (1948), 332 U.S. 596, 92

L.Ed. 224, 68 S.Ct. 301, the Court stated that

> "the test to be applied in determining the voluntariness of a statement is whether it has been made freely, voluntarily and without compulsion or inducement of any sort or whether the defendant's will has overcome at the time he confessed."

In deciding that the defendant's statement was not proved to be voluntary, the court was influenced by the following factors:

1. The defendant was 14 years old. (App. Ct. opinion)

2. The defendant was interrogated for 17 hours during two days of questioning and twice examined by a polygraph examiner. (App. Ct. opinion)

3. When the police initially approached the defendant at school, he indicated he did not wish to talk to them. (R.45)

4. When Miranda warnings were given for the first time eight hours after questioning began, the defendant exercised his right to remain silent. (R.121)

5. After spending the night in a juvenile detention center, the defendant was brought to the police station for further questioning. (R.138)

6. The defendant made no explicit oral or written waiver of his Miranda rights. (App. Ct. opinion)

7. After making an inculpatory statement, the defendant denied any involvement to his probation officer. (R.240)

The court held:

> "Without deciding that the length of questioning would of itself justify suppression of the statements as not voluntary, we believe the cumulative effect of all the circumstances does compel the conclusion the prosecution did not sustain its burden of establishing the voluntariness of the statements."

There is nothing in the court's analysis of the voluntariness issue which is inconsistent with the decisions of this court.

The defendant also argued that the record was void of sufficient evidence to a knowing and voluntary waiver of his Miranda rights. The Appellate Court recognized that no particular form of waiver is required. United States v. Hayes, (4th Cir. 1967) 387 F.2d 375; Bond v. United States, (10th Cir. 1968) 397 F.2d 162; North Carolina v. Butler (1979) 441 U.S. 369, 60 L.Ed. 2d 286, 99 S.Ct. 1755. But recognized that waiver will not be implied either from a silent record or from the fact that the defendant may have made statements. Tague v. Louisiana, _____ U.S. _____, 62 L.Ed. 2d 622, 100 S.Ct. 652 (1980). The court held that under the circumstances of this case, the state failed to show a knowing and intelligent waiver of the defendant's Miranda rights.

Finally, the defendant argued that the defendant's right to cut off questioning was not scrupulously honored by the police. It is the court's ruling in this regard that the petitioner takes greatest exception to. The petitioner claims that the appellate court expands the requirement placed on reinterrogation established in Michigan v. Mosley, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed. 2d 313 (1975). The petitioner agrees with the Illinois Appellate Court's holding that reinterrogation need not be about an offense other than the one for which the defendant was taken into custody, but may concern the same offense. But the petitioner disagrees that under the circumstances of this case, they should have shown a reason why this boy was brought from the detention center for further questioning when he had indicated he did not want to talk. Rather than expand upon the ruling in Mosley, the court merely applied the rationale of Mosley to the circumstances of this case.

The decision of the Illinois Appellate Court is not in conflict with federal cases or those from other state jurisdictions and Respondent urges this court to deny petitioner's request for the issuance of a writ of certiorari.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should not be granted.

Respectfully submitted,

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